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Walter Michael Andrus; Sui Juris.

Brady T. Gibbs; Wrona Law Firm, P.C.; Counsel for Rebekah Andrus

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IN THE UTAH COURT OF APPEALS

WALTER MICHAEL ANDRUS,
Plaintiff/Appellant,

)

REPLY BRIEF OF APPELLANT

)

(ON APPEAL)

v.

)

**THE NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY,**
Defendant.

)

)

REBEKAH ANDRUS,
Interpleader Plaintiff/Appellee,

)

v.

)

WALTER MICHAEL ANDRUS,
Defendant.

)

Case No. 20090893-CA

)

)

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IN THE UTAH COURT OF APPEALS

WALTER MICHAEL ANDRUS,)	REPLY BRIEF OF APPELLANT
Plaintiff/Appellant,)	
)	(ON APPEAL)
v.)	
THE NORTHWESTERN MUTUAL LIFE		
INSURANCE COMPANY,)	
Defendant.)	
)	
REBEKAH ANDRUS,)	
Interpleader Plaintiff/Appellee,)	
v.)	
WALTER MICHAEL ANDRUS,)	Case No. 20090893-CA
Defendant.)	
)	
)	

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Parties to the Appeal

The parties to the appeal are Appellant WALTER MICHAEL ANDRUS, and Appellee REBEKAH ANDRUS. See page 6 below regarding the real parties in interest.

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Argument

I. Appellant's Brief is Adequate for Consideration of the Appeal.

While Appellant's counsel did not cite directly to the record, counsel did cite to the documents relied upon, each of which is part of the record on appeal. For example, counsel cited regularly to the Affidavit of Walter Michael Andrus (Exhibit 1 of Plaintiff's Memorandum, found at R. 66) which detailed many of the undisputed facts that the district court should have relied on to grant summary judgment for the Appellant. Appellant's counsel also cited to the Life Insurance Policy, the Petition for Guardianship, Jared Andrus' Witness Statement, the Findings of Fact from the guardianship case, the Letter of Guardianship, the Designation of Beneficiaries Form, and the Mary Elizabeth Andrus Nevada Trust Agreement, each of which is an Exhibit following the Plaintiff's Memorandum, at R. 66. Appellant also cited to the Original Transcript of Hearing, found at R. 332. Appellant's citations thus provide sufficient reference to the record to assist the court in viewing the undisputed facts and the history of the case.

Moreover, Appellant's brief cited the relevant statutory and case law authorities necessary for the court to decide the appeal, including Utah Code section 75-5-312(2), which provides the basis for Appellant's central argument on appeal, and Utah Code section 31A-22-413(2), which is the statute setting the lawful time frame for submission of a change of beneficiary form. The Appellant did not cite to the various other statutes referenced in the Appellee's brief because those Code sections are not controlling.

II. The Change of Beneficiary was Within the Guardian's Authority Under the Utah Code and the Court's Letter of Guardianship.

The Appellee argues that Appellant, while acting as his son's court-appointed guardian, did not have the authority to change the son's life insurance beneficiary. Appellee argues that the Appellant should have sought permission from the District Court prior to making the beneficiary change. In making this argument, Appellee attempts to apply conservatorship requirements to a guardianship case, though the Utah Code makes no such application.

Appellee bases her argument on Utah Code sections 75-5-401 through 408, which detail the requirements and procedures for the institution of protective proceedings. Section 75-5-401(2) states:

Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that the person:

(a) is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and

(b) has property which will be wasted or dissipated unless proper management is provided or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and protection is necessary or desirable to obtain or provide funds.

Under this provision, the court has authority to appoint a conservator or issue a protective order if the incapacitated person's property is at risk of being wasted. This provision does not apply to the present case because the guardian's action involved changing the beneficiary of a contract entered into by the incapacitated person (a term life insurance

policy), rather than disposing of the property of the incapacitated person. Moreover, a term life insurance policy, which had no cash value and which is governed by contact law rather than probate proceedings, would not be considered part of Jared Andrus' personal property or estate.

In her argument, Appellee also refers to Utah Code section 75-5-209, which, because it governs guardianship of a minor, is not controlling in the present case, which involved guardianship of an incapacitated adult. Section 75-5-209 is favorably analogous to Utah Code section 75-5-312(2), in that both allow the probate court to give a broad grant of authority to the court-appointed guardian and neither specifically requires a guardian to apply for court permission before changing the beneficiary on a ward's life insurance policy.

III. Reference to the Disputed Deposition of the Appellant at Oral Argument was Improper.

The Appellant contends that Appellee's references to the Appellant's Deposition during oral argument on the Motions for Summary Judgment was improper and may have influenced the district court's decision. The Appellee counters this by arguing that the Appellant failed to take the steps necessary to contest the deposition and by attaching a copy of the court reporter's certificate. This is disappointing, as the Appellee knows perfectly well that the Appellant attempted to resolve the problem and that the court reporter's certificate contains a false statement. *See* Addendum 1.

Appellant's counsel contacted both the court reporting company and counsel for the Appellee in multiple attempts to obtain a copy of the deposition for the Appellant to

review, correct, and sign. Counsel for Appellee was notified that the court reporting company refused to cooperate. The court reporting company never provided Appellant or his counsel with a reading copy of the deposition, making the reporter's statement—that such a copy was provided to Appellant—a false statement. Counsel for Appellant raised the issue in his Memorandum, filed with the district court prior to oral argument. Despite this Appellant's counsel still proceeded to refer to the disputed deposition in his oral argument.

IV.Appellee's Claim Was Not Brought By and Against the Real Parties in Interest.

Rule 17(a) of the Utah Rules of Civil Procedure requires that lawsuits be prosecuted by and against the real parties in interest. In the present case, Mr. Andrus, the living man, has recently become aware that this case has not been prosecuted by, or against, the real parties in interest. Mr. Andrus' Affidavit of Specific Denial (Raising the Issue of Legal Existence or Capacity to Sue under Utah Rule of Civil Procedure 9(a)), attached as Addendum 2, enters Mr. Andrus' denial that he is the fictional entity that was sued under the designation WALTER MICHAEL ANDRUS. The Affidavit further denies that REBEKAH ANDRUS (aka REBEKAH D. ANDRUS) is the real party in interest with standing to bring the suit. WALTER MICHAEL ANDRUS and REBEKAH ANDRUS, written in all-capital letters, are legal fictions. Mr. Andrus moves the Court of Appeals to correct this error by remanding the case to the District Court for a determination of the real parties in interest and further proceedings by those parties.

To allege otherwise than as stated in Mr. Andrus' Affidavit of Specific Denial is a mistake or condition of mind. *See* Utah Rule of Civil Procedure 9(b). Mr. Andrus wishes to correct his mistakes or condition of mind as he has become aware of them; and does so now.

It is important, in the interest of justice, that the fraud or mistakes or condition of mind specifically denied above be addressed/corrected, so that the court not be misled by error – even inadvertent error - on the part of any party. This is particularly important as it touches on the issue of jurisdiction. *See* Utah Rule of Civil Procedure 12 (h)(2); *see also* Federal Rule of Civil Procedure 15(c)(1)(C)(i) and (ii). The correction/explanation of true status is relevant and timely. As soon as Mr. Andrus discovered the true status of the parties and upon diligent review of the same, Mr. Andrus believed it to be his obligation to inform the court of the mistaken identity of the real party in interest. Utah Rule of Civil Procedure 17(a)(1).

Even if the court finds against WALTER MICHAEL ANDRUS, it would then be finding against an entity which is not the real party in interest and the finding and resulting order would fall upon an entity without standing or interest relative to the underlying issue. It is not possible to find against Mr. Walter Michael Andrus, the living man, as he is not named in the cross complaint. It is the obligation of the party bringing the cross complaint to be certain of their true and correct status and to be certain to bring the action in compliance with Rule 17.

Can the Utah Court of Appeals take judicial notice of the facts and law on appeal? The answer is a resounding "yes, maybe." The debate over judicial notice is not easily resolved. There is a strong policy in appellate practice that parties are prohibited from raising issues or arguments or presenting evidence or documents for the first time on appeal. Yet, there is an equally strong policy that appellate courts not render decisions contrary to facts and law undisputed and incontrovertible. For example, as a result, in the interests of justice, Florida appellate courts, will, as a matter of actual practice, judicially notice matters for the first time on appeal, usually without even referencing the evidence code.

In addition, the Federal Rules of Evidence provide that judicial notice may be taken at any stage of the proceedings, whether requested or not, of adjudicative facts that are "not subject to reasonable dispute" and either 1) "generally known within the territorial jurisdiction of the trial court" or 2) "capable of accurate and ready determination."

Federal appellate courts, for example, recognize that they may take judicial notice of law and even of contracts, as well as the rules, regulations, and orders of administrative and other quasi-judicial bodies that are issued pursuant to their delegated authority.

The First District Court in Florida, in *Gulf Coast Home Health Services v. Department of Health Rehabilitative Services*, 503 So. 2d 415, 417 (Fla. 1st DCA 1987)(emphasis added), has articulated some of the best guidance on this issue:

The general rule that we deduce from these opinions, and the one which we have applied in disposing of the motions before us, is that it is altogether appropriate for the appellate court to take judicial notice of the existence of other cases, either pending or closed, which bear a relationship to the case at bar. That **notice may include, at minimum, the identity of the parties** and their counsel, the lower tribunal from which an appeal was taken and the provisions of the order on appeal, issues presented in the briefs, the status of a file within the court, and the dates of orders of the trial and appellate courts.

Judicial notice on appeal is a vital adjudicative device for advancing appellate decisions on the merits. Judicial notice was designed so a party does not have to formally present evidence to prove a fact that is “outside the area of reasonable controversy.”

Thus, Mr. Andrus specifically moves the Court to take judicial notice that this action lacks the real parties in interest and to remand the case to the District Court for further hearing to determine and proceed with the real parties in interest.

Conclusion

The court should reverse the lower court’s decision granting partial summary judgment and should remand the case for further proceedings by the real parties in interest.

RESPECTFULLY SUBMITTED this 20th day of May, 2010.

Walter Michael Andrus
Sui Juris

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2010, I served a copy of this Reply Brief on counsel for the Appellee by first class US Mail, postage prepaid, to Brady T. Gibbs, Wrona Law Firm PC, 11650 S. State St., Suite 103, Draper, UT 84020.

Walter Michael Andrus

Addendum 1

Addendum 2